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# A Look Back at the “Gatehouses and Mansions” of American Criminal Procedure

Yale Kamisar\*

I am indebted to Professor William Pizzi for remembering—and praising—the “Gatehouses and Mansions” essay I wrote fifty years ago.<sup>1</sup>

A great many articles and books have been written about *Miranda*.<sup>2</sup> So it is nice to be remembered for an article published a year before that famous case was ever decided.

## I. THE BACKGROUND FOR THE “GATEHOUSES” ESSAY

Professors George Thomas and Richard Leo suggest<sup>3</sup> that my “Gatehouses” essay was inspired by the famous case of *Ashcraft v. Tennessee*,<sup>4</sup> especially the following paragraph:

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\* Clarence Darrow Distinguished University Professor Emeritus of Law, University of Michigan; Professor Emeritus of Law, University of San Diego School of Law.

<sup>1</sup> William T. Pizzi, *Revisiting the Mansions and Gatehouses of Criminal Procedure: Reflections on Yale Kamisar’s Famous Essay*, 12 OHIO ST. J. CRIM. L. 633 (2015), commenting on YALE KAMISAR, FRED E. INBAU & THURMAN ARNOLD, CRIMINAL JUSTICE IN OUR TIME (1965). I should point out that eleven years ago, on my retirement from the University of Michigan Law School, Professor Tracey Maclin also had some nice things to say about my “Gatehouses and Mansions” article. See Tracey Maclin, *Is Yale Kamisar as Good as Joe Namath?: A Look Back at Kamisar’s “Prediction” of Miranda v. Arizona*, 2 OHIO ST. J. CRIM. L. 33 (2004).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

*Miranda* has suffered many blows since 1969, when Chief Justice Burger replaced Chief Justice Warren. For a discussion of these “blows,” see generally Yale Kamisar, *The Rise, Decline and Fall (?) of Miranda*, 87 WASH. L. REV. 965 (2012). However, I am inclined to agree with Professor Pizzi and his co-author when they say that *Miranda* “keeps on, oblivious to the fact that the same disease that keeps it weak also keeps it alive.” William T. Pizzi & Morris B. Hoffman, *Taking Miranda’s Pulse*, 58 VAND. L. REV. 813, 849 (2005).

<sup>3</sup> GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 151 (2012).

<sup>4</sup> 322 U.S. 143 (1944). As Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195, 2226 (1996), has observed, “*Ashcraft* was a milestone because it prefigured *Miranda*’s recognition of the coercion inherent in all custodial interrogation.”

*Ashcraft* was not the first time the Supreme Court contrasted the proceedings in the police station with those in the courtroom. Consider *Lisenba v. California*, 314 U.S. 219, 237 (1941):

The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence.

It is inconceivable that any court of justice in the land . . . [would] permit prosecutors serving in relays to keep a [defense] witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.<sup>5</sup>

Professors Thomas and Leo are quite right. I was inspired by *Ashcraft*. I hasten to add, however, that I was even more influenced by a 1961 article written by Bernard Weisberg.<sup>6</sup> Indeed, I consider the Weisberg article one of the best ever written on the subject of police interrogation and confessions.

Because he believed that it would be "playing Hamlet without the ghost to discuss police questioning without knowing what such questioning is really like,"<sup>7</sup> Weisberg made extensive use of the police interrogation manuals. (He appears to have been the first law review writer to have done so.) He called attention to the striking differences between the proceedings in the stationhouse and those in the courtroom:

In court, with few exceptions, proceedings are public. In the police station, questioning is said to be effective only if it is conducted in privacy. In court, the defendant is entitled to the advice and support of a lawyer as well as family and friends. In the police station, the suspect is ordinarily not permitted to communicate with his family or a lawyer until his interrogation has been completed. In court, the defendant is entitled to know the charge against him and be confronted by adverse

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<sup>5</sup> *Ashcraft*, 322 U.S. at 154. But one reason *Ashcraft* is a great case is that Justice Jackson wrote a powerful dissenting opinion (*id.* at 161–62):

The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention. . . .

But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive"? The Court does not quite say so, but it is moving far and fast in that direction. The step it now takes is to hold this confession inadmissible because of the time taken in getting it.

. . . .  
If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more than is permissible, what about 24? or 12? or 6? or 1? All are "inherently coercive."

<sup>6</sup> Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. & CRIMINOLOGY 21 (1961). As the biographical sketch set forth at the outset of Weisberg's article points out, he was co-author of *Secret Detention by Chicago Police* (1959), a report by the Illinois Division of the ACLU.

<sup>7</sup> *Id.* at 22.

witnesses. . . . In the police station, the interrogator seeking a confession is likely to question a suspect on the hypothesis that he is guilty although the evidence is inconclusive. In court, an impartial judge and loyal counsel will protect the accused against badgering, questions based on false premises and other kinds of unfair cross-examination.<sup>8</sup>

However, as significant as Weisberg’s 1961 article was, it was not his most important contribution. As fate would have it, that occurred several years later when Weisberg became heavily involved in the *Escobedo* case<sup>9</sup> (probably the most famous confession case ever—until *Miranda*<sup>10</sup> came along).

As the primary author of the amicus brief in *Escobedo*, Weisberg once again called attention to the police interrogation manuals:

We urge the Court to examine these books. They are not exhibits in a museum of third degree horrors. Indeed they carefully advise the police interrogator to avoid tactics which are clearly coercive under prevailing law. They are invaluable because they vividly describe the kinds of interrogation practices which are accepted as lawful and proper under the best current standards of professional police work.<sup>11</sup>

Weisberg and his colleagues argued forcefully that the so-called “‘fair and reasonable’ and ‘effective’ police interrogation which has been described in this brief and in effect sanctioned by the Illinois Supreme Court in this case” is “‘inherently coercive.’”<sup>12</sup> Moreover, the police interrogation “adds a stage to criminal prosecutions which is not described in the statutes or judicial decisions relating to criminal procedure—a preliminary, secret and informal examination by interrogators whose actions are not governed by judicial standards and are essentially unsupervised.”<sup>13</sup>

The year I wrote the “Gatehouses and Mansions” article I was a visiting professor at Harvard Law School and Harvard’s Arthur Sutherland was also

<sup>8</sup> *Id.* at 21.

<sup>9</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>10</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>11</sup> Brief for American Civil Liberties Union Amicus Curiae at 4, *Escobedo*, 378 U.S. 478 (No. 615) [hereinafter Brief for ACLU].

Weisberg’s 1961 article and his 1964 *amicus* brief seem to have set the fashion for civil libertarians. The ACLU brief in *Miranda*, largely the work of Professors Anthony Amsterdam and Paul Mishkin, reprinted a full chapter from one interrogation manual. *Id.* at 4–8. In turn, Chief Justice Warren filled close to seven pages of his *Miranda* majority opinion with extracts from various police manuals and texts. See *Miranda*, 384 U.S. at 448–55.

The Chief Justice noted that the manuals and texts he was quoting from “‘professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation.” *Id.* at 449.

<sup>12</sup> Brief for ACLU, *supra* note 11, at 11–16.

<sup>13</sup> *Id.* at 11.

writing an article on confessions about the same time I was.<sup>14</sup> We soon exchanged drafts.

At this stage of my article, I was writing about the “outhouses” (not “Gatehouses”) and “Mansions.” Sutherland soon convinced me that “outhouses” was not only inelegant but inappropriate. He suggested I substitute “Gatehouses” for “outhouses.”

Having grown up in an overcrowded apartment in the Bronx, I had no idea what a gatehouse was. Once Professor Sutherland explained it to me, however, I knew he had provided me with the right word. After all, you have to go through the “gatehouse” before you get to the “mansion”—and an astonishing number of defendants never get past the gatehouse.<sup>15</sup> Moreover, “gatehouse” fits much better with “mansion” than “outhouse” does.

Although other factors influenced me as well, I have no doubt that when I wrote the “gatehouses and mansions” article, “the root from which I drew the juices of indignation” (if I may quote myself)<sup>16</sup> was a 1963 Minnesota case called *State v. Biron*.<sup>17</sup>

This was not simply a recording of the confession itself (even in those days, this was not so extraordinary), but of the police *interrogation* itself—starting with the first comment made by the first interrogator. Five different members of the Minneapolis police department’s homicide division, each with his own style, had questioned the suspect for a total of six hours.

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<sup>14</sup> See Arthur E. Sutherland, Jr., *Crime and Confession*, 79 HARV. L. REV. 21 (1965). Sutherland was essentially cheering on the U.S. Supreme Court.

At one point in his article, Sutherland noted that if a well-to-do testatrix planned to will her property to A, but was kept secluded for hours, questioned intensively during that time and finally pressured to leave her money to B, no judge of probate would consider her decision a “voluntary” act. See *id.* at 37.

In his *Miranda* opinion, Chief Justice Warren quoted the Sutherland article with approval. See 384 U.S. at 457 n. 26. On the other hand, dissenting Justice Harlan quickly dismissed the article. See *id.* at 516 n.13 (Harlan, J., dissenting): “With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.”

It turns out, however, that Professor Sutherland had anticipated Justice Harlan’s response. See Sutherland, *supra*, at 37:

At once one will hear that the testatrix is not a criminal; that obtaining a surrender of rights from a criminal is different; that the interest of the state demands that criminals be not coddled. That is to say we are told that a man with his life at stake should be able to surrender an ancient constitutional right to remain silent, under compulsions which in a surrender of a little property would obviously make the transaction void.

<sup>15</sup> Recently, the Supreme Court pointed out that “ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.” See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

<sup>16</sup> See YALE KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* xii (1980) (Introduction).

<sup>17</sup> 123 N.W.2d 392 (1963), noted in *The Minnesota Supreme Court 1962-1963*, 48 MINN. L. REV. 119, 160 (1963). At the time this case arose, I was teaching at the University of Minnesota Law School.

The decision to tape record the interrogation in the *Biron* case was not made with the intent to offer the tape in evidence. Instead it was made on the assumption that Biron would "crack" in a short time and that the playing of his taped confession to his accomplices would lead them to confess as well. Most of the interrogators had no idea that they were being taped (which made their techniques even more significant).

As it turned out, Mr. Biron resisted efforts to get him to incriminate himself for a longer time than expected. But he finally did succumb. When Biron's lawyer discovered that a tape of the interrogation existed, the tape was admitted into evidence. Although none of the interrogators resorted to violence, or threatened to do so, their pressuring, wheedling, and nagging is so repetitious and so unrelenting that it is difficult to listen to for very long.<sup>18</sup>

The Minnesota Supreme Court reversed Biron's murder conviction primarily on the ground that the police had led Biron to believe that even though he was a month past 18 years old, he might still be treated as a juvenile if he "cooperated" with them (i.e., confessed).<sup>19</sup> (This was a flat misstatement of the law.) Moreover, the police also told Biron that if he "cooperated" with them, there was a good chance he might only be charged with manslaughter rather than murder, another ground for reversal.<sup>20</sup>

It is not at all clear that Biron would have prevailed if there had not been any tape recording in the case. Biron might not even have remembered everything his interrogators led him to believe they would do on his behalf if he confessed. When Biron finally did admit his involvement in the crime, even one of his interrogators observed that "he was crying [all during the time he made his statement] and he was shaking, he was sobbing pretty hard and his whole body was quivering."<sup>21</sup>

In a case like *Biron*, a tape recording of the interrogation is so helpful, and litigating the admissibility of a confession *without any* objective record of the police tactics so inadequate, that ever since I heard about the *Biron* case I have been a strong proponent of taping police interrogation (*all* of it).

It strikes me that the fact that we must now deal with *Miranda* as well as the "voluntariness" test only strengthens the need to tape the proceedings in the station houses. How else can we ascertain the precise timing of the warnings, the clarity with which they were given, and the tactics the police may have used to undermine them?<sup>22</sup>

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<sup>18</sup> For a sampling of Biron's interrogation, see Kamisar, *supra* note 16, at 98–99 n.3. Many of the techniques used by Biron's interrogators were recommended by the standard manuals, e.g., stressing the futility of resistance, sympathizing with the offender, keeping the "subject" on the defensive, displaying an air of confidence in the "subject's" guilt.

<sup>19</sup> See *Biron*, 123 N.W.2d at 394–95.

<sup>20</sup> See *id.* at 396.

<sup>21</sup> *Id.* at 397.

<sup>22</sup> In the early 1970s when *Miranda* was on the books, I was a Co-Reporter for the *Uniform Rules of Criminal Procedure* project (along with Professors Wayne LaFare and Jerold Israel). Some members of the project's Special Committee balked about a proposal (eventually adopted) to record,

II. WAS THE “GATEHOUSES” ESSAY “INCONSISTENT”?  
WHY DIDN’T THE *MIRANDA* COURT GO FURTHER THAN IT DID?

Professor Pizzi notes that when I wrote my “Gatehouses” essay I “seemed a bit conflicted on whether any interrogation of arrestees should be permitted.”<sup>23</sup>

At one point I stated that “I would not abolish all in-custody police interrogation,” but only the “in-custody interrogation which takes place under conditions undermining a suspect’s freedom to speak or not to speak—and the all too prevalent questioning of those who are unaware and uninformed of their rights.”<sup>24</sup> Some twenty-five pages later, however, I seemed to doubt whether the police were likely to, or could be trusted to, advise suspects of their rights in a meaningful way:

[W]hen we expect the police dutifully to notify a suspect of the very means he may utilize to frustrate them—when we rely on them to advise a suspect unbegrudgingly and unequivocally of the very rights he is being counted on *not* to assert—we demand too much of even our best officers. As Dean Edward L. Barrett has asked: “[I]s it the duty of the police to persuade the subject to talk or persuade him not to talk? They cannot be expected to do both.”<sup>25</sup>

I did not reread the “Gatehouses” essay for many years until I did so recently in order to respond to Professor Pizzi’s comments about it. I have to agree with him that I was inconsistent.

I am afraid that I mixed up my hopes with my expectations. I could not

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whenever feasible, “the information of rights, and waivers thereof, and any questioning.” I sent each committee member a copy of the *Biron* recording and asked each to play the recording and then to consider how one could litigate the admissibility of the confession *without* the recording. Everybody agreed to the need for a recording.

In their recent book, Professors Thomas and Leo support “recording the relevant contact between the police and the suspect,” THOMAS & LEO, *supra* note 3, at 220–21, but they quickly add: “Perhaps one hundred other writers are on record recommending some form of recording.” *Id.* at 221. However, at least one commentator has declined to add his name to the list. See Lawrence Rosenthal, *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 607 (2007) (“there is little reason to believe that videotaping is likely to improve *Miranda* compliance or enhance the reliability of factfinding—there is simply not much empirical evidence that either is a significant problem.”).

<sup>23</sup> Pizzi, *supra* note 1, at 635.

<sup>24</sup> Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1, 10 (1965).

<sup>25</sup> *Id.* at 35–36. I always thought that Dean Barrett’s observation, written in his amicus brief filed in *People v. Dorado*, deserved to be ranked as one of the greatest lines ever uttered in the unending debate about *Miranda*. See Brief of Edward L. Barrett, Jr., as Amicus Curiae at 9, *People v. Dorado*, 398 P.2d 361 (1965) (on rehearing).

expect the *Miranda* Court to go further than it did "at one gulp."<sup>26</sup> But I hoped that *someday* it would.

The "Gatehouses" essay was written a year *before* the *Miranda* case—at a time when there was a distinct possibility that *Escobedo* (the dominant confession case at the time) might be limited to its facts. This would not have been very difficult because *Escobedo* was an unusual confession case: the defendant had retained a lawyer, met with him and then tried to meet with him again, just before he was tricked into admitting his involvement in the crime.<sup>27</sup>

There is reason to believe that the division among the *Miranda* Justices was extraordinarily close. According to one justice who participated in the deliberations, the Court was so evenly divided that it was barely able to go as far as it did. According to this Justice, the fact that FBI agents had been advising custodial suspects of their rights (although they had not been doing so to the extent required by *Miranda*) may have been "the critical factor in the *Miranda* vote."<sup>28</sup>

To be sure, the *Miranda* Court did not go as far as the ACLU wished.<sup>29</sup> Nevertheless, *Miranda* went a long way.

*Miranda* required the police—for the first time—to advise all custodial suspects that they had a right to remain silent.<sup>30</sup> The case also required the police—again, for the first time—to notify all custodial suspects (many of whom, probably most, could not afford a lawyer) that they had a right to the assistance of counsel, even though they could not afford to pay for a lawyer. That strikes me as

<sup>26</sup> At this point, I am borrowing language from Justice Tom Clark, who dissented in *Miranda*. At one point, Clark protested, "To require all those things at one gulp should cause the Court to choke over more cases than . . . it expressly overrules today." *Miranda*, 384 U.S. at 502.

<sup>27</sup> In fact, *Escobedo*'s lawyer had obtained his client's release eleven days earlier—only to see him rearrested. Shortly before Mr. *Escobedo* confessed, he tried unsuccessfully to meet with his lawyer and his lawyer tried unsuccessfully to meet with his client.

One way to limit *Escobedo*, suggested Judge Henry Friendly a year before *Miranda* was decided, is to "read" it "as requiring the assistance of counsel only when the police elicit a confession at the station house from a suspect, already long detained, whose case is ripe for presentation to a magistrate." Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, in *BENCHMARKS* 235, 259 (1967). See generally DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* 74–78 (2003).

<sup>28</sup> See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 589 (1983) (The name of the justice is not disclosed.).

<sup>29</sup> The ACLU maintained that custodial suspects should not have to waive their rights unless and until they did so in the presence of a defense lawyer—a position that seems more understandable today than it did at the time *Miranda* was decided. In *Moran v. Burbine*, 475 U.S. 412, 426 (1986), the Court per O'Connor, J., noted that *Miranda* had rejected "the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation."

<sup>30</sup> As Professor Donald Dripps has observed, custodial suspects "*always had* the right to refuse to answer questions put by the police," but until *Miranda* was handed down the police were not required to tell them this. See Donald A. Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 24 (2000).



a pretty good day's work.<sup>31</sup>

There is another factor to be considered. At the time *Miranda* was decided, there was no reason to think that it would be the last word the Warren Court would have to say about confessions. As I told Liva Baker, author of a book about that famous case, I had assumed that *Miranda* would only be the first of a series of cases "fleshing out" or "reinforcing" the original *Miranda* opinion.<sup>32</sup>

At one point, for example, the *Miranda* opinion informed us that "a heavy burden" rests on the prosecution to establish that a defendant "knowingly and intelligently" waived his or her rights.<sup>33</sup> Then the Court went on to say: "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings . . . , the burden is rightly on its shoulders."<sup>34</sup>

As I read *Miranda*, at this point it seems to have come to the very edge of saying that, when it appears feasible to do so, the government should be required to make an objective record of the interrogation or, at the very least, the "waiver of rights" transaction. If the Court had concentrated on this issue, would there have been five votes for such a requirement?

I think it is conceivable there might have been as many as six votes. I would go so far as to say that even Justice White, who wrote the harshest dissent of all in *Miranda*, might have gone along with a taping requirement.

I say this because at one point Justice White appeared open to the possibility of corroborating the proceedings in the police station when such a requirement seemed appropriate. To quote him:

Even if one were to postulate that the Court's concern is . . . that some confessions are coerced and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required . . . or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.<sup>35</sup>

If the Warren Court had remained intact, the next time around it might have

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<sup>31</sup> Commentators are still arguing about the costs and benefits of *Miranda* and probably always will be as long as the case remains on the books. For a vigorous debate on these issues by two well-known commentators, compare Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996), and Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996), with Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996).

<sup>32</sup> See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 185 (1983).

<sup>33</sup> *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 535 (Justice White, joined by Harlan and Stewart, JJ., dissenting).

required the police to tape record the entire interrogation they conducted—or at least everything pertaining to the waiver of rights. As it turned out, however, *there was no* “next time around.”

Only three years after *Miranda* was decided, two members of the five-Justice *Miranda* majority (Warren and Fortas) were no longer on the Court. Two years after that, a third member of the *Miranda* majority (Hugo Black) stepped down.

When campaigning for the presidency, Richard Nixon (as one of his critics described it), had viewed the “bewildering problem[] of crime in the United States” as “a war between the ‘peace forces’ and the ‘criminal forces.’”<sup>36</sup> Unfortunately for those who liked *Miranda* and the general direction in which the Court had been moving, President Nixon made four Supreme Court appointments in his first term: Warren Burger, Harry Blackmun, Lewis Powell, Jr., and William Rehnquist. None of them were friends of *Miranda*.

Not surprisingly, Chief Justice Burger and Justice Rehnquist turned out to be perhaps the two most “police-friendly” Justices in Supreme Court history.<sup>37</sup> As for Justice Powell, by the time he was appointed to the Court, he was already on record as a critic of *Miranda*.<sup>38</sup>

### III. WHY DO SO MANY CUSTODIAL SUSPECTS WAIVE THEIR RIGHTS?

Looking back at *Miranda* a half-century later, the most surprising thing about its aftermath may very well be the percentage of custodial suspects who seem to be waiving their rights and talking to the police—an astonishing eighty percent.<sup>39</sup> To quote Professors Thomas and Leo, *Miranda* may have given custodial suspects “the key to the interrogation room,” but the suspects seem to have “hand[ed] the

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<sup>36</sup> Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539 (1975) (referring to Mr. Nixon’s position paper on crime).

<sup>37</sup> See Kamisar, *supra* note 2, at 975–80. As it turned out, Chief Justice Burger dealt the first blow to *Miranda* in *Harris v. New York*, 401 U.S. 222 (1971) and Justice Rehnquist administered the second blow in *Michigan v. Tucker*, 417 U.S. 433 (1974). See Kamisar, *supra* note 2, at 980–91.

<sup>38</sup> Powell had been one of seven members of the National Crime Commission to express his unhappiness with *Miranda* and urge a return to the pre-*Miranda* voluntariness test, even if, “as now appears likely, a constitutional amendment is required.” See THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 303, 307–08 (1967).

As for Justice Harry Blackmun, many assumed that he would be an ally of Chief Justice Burger because the two had been close friends since childhood and the Chief Justice had recommended Blackmun for the opening on the Supreme Court. But after a few years it became clear that Justice Blackmun felt no obligation to side with the Chief Justice. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 185 (2005).

<sup>39</sup> See GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* 191–92 (2012); Charles Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1547–63 (2008). Perhaps because they are so taken aback by this high figure, Professors Thomas and Leo mention this percentage at least eight times in their recent book. See THOMAS & LEO, *supra*, at 9, 176, 177, 185, 188, 190, 191 and 217.

key back and incriminate[d] themselves.”<sup>40</sup>

There is reason to believe that the delivery of the *Miranda* warnings is sometimes, perhaps even routinely, undermined by police interrogators who (a) blend the warnings with booking questions or (b) build a rapport with suspects *before* advising them of their rights or (c) deliver the warnings as if they were merely bureaucratic triviality or (d) inform suspects at the outset that they will not be able to tell the police “their side of the story” unless they first waive their rights.<sup>41</sup> Sometimes it is the other way around—the police tell suspects that the police will not be able to disclose the evidence *against* them unless they first waive their rights.<sup>42</sup>

There is a good deal we still do not know. We are still not sure to what extent the *Miranda* warnings reduce the “inherently coercive” nature of police interrogation. Nor is that all. At this late date, we still cannot eliminate the possibility that suspects might talk to the police *because* of the warnings. After all, the warnings indicate that the police believe the suspect is, or may be, guilty of a crime and the warnings “thus *invite* a response if the suspect is to maintain that he is innocent.”<sup>43</sup>

Many lawyers participated in the litigation over *Miranda* and its companion

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<sup>40</sup> THOMAS & LEO, *supra* note 39, at 168.

<sup>41</sup> See *id.* at 191–92; David Simon, *Homicide: A Year on the Killing Streets*, in THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 51–64 (Richard A. Leo & George C. Thomas III eds., 1998); Richard A. Leo, *From Coercion to Deception: The Changing Nature of the Police Interrogation in America*, in THE MIRANDA DEBATE, *supra*, at 65–74; Richard A. Malone, “You Have the Right to Remain Silent”: *Miranda After Twenty Years*, in THE MIRANDA DEBATE, *supra*, at 75–85; Richard A. Leo, *The Impact of Miranda Revisited*, in THE MIRANDA DEBATE, *supra*, at 208–21; George C. Thomas III, *The Twenty-first Century: A World without Miranda?*, in THE MIRANDA DEBATE *supra*, at 323–26.

<sup>42</sup> See THOMAS & LEO, *supra* note 39, at 192. See also Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1459 (1985) (discussing the curiosity of suspects to know about the evidence against them).

<sup>43</sup> See THOMAS & LEO, *supra* note 39, at 217 (emphasis added). Patrick Malone also makes this point. See Richard A. Malone, “You Have the Right to Remain Silent”: *Miranda After Twenty Years*, in THE MIRANDA DEBATE *supra* note 40, at 84.

As pointed out in Caplan, *supra* note 42, at 1461, both the American Civil Liberties Union (ACLU) and the National District Attorneys Association (NDAA) were opposed to police warnings. Nevertheless, these two organizations were far, far apart.

The NDAA *amicus* brief argued that only “the professional and the recidivist” would benefit from a warning. See Brief of National District Attorneys Association, *Amicus Curiae* at 5, 14, *Miranda v. Arizona*, 384 U.S. 436 (1966). The ACLU maintained that merely warning suspects of their rights would be inadequate because even if the warning might work for a while “its effectiveness would soon wear off when confronted by the plethora of police stratagems and techniques designed precisely to loosen the subject’s tongue”—as occurred in *Escobedo*—when an accomplice’s accusation “overcame the subject’s desire not to speak.” *Amicus* brief for the NDAA, *supra*, at 26–27.

The ACLU brief insisted that nothing less than the presence of defense counsel at the police interrogation would be adequate. The NDAA brief never even discussed the possibility of conditioning police questioning on the presence of counsel.

cases. Probably the most distinguished lawyer for the states, who were urging the Court to move slowly (and let the state legislatures do whatever work had to be done), was Telford Taylor. He was the principal author of an amicus brief on behalf of 27 states and he also argued the case on behalf of these states.<sup>44</sup> A former high-ranking Nuremberg prosecutor, and a Columbia Law School professor at the time he argued *Miranda*, Taylor was the lawyer for the states the Court was likely to take the most seriously.

We know that when it finally issued its opinion, the *Miranda* Court required the police to advise custodial suspects of their rights. We do not know how often the Justices, and the many lawyers involved in *Miranda* and related cases, believed (or assumed) that those advised of their rights would assert them. What, for example, did Professor Taylor have to say about suspects waiving their rights?

Nothing really. To put it another way, he simply assumed that virtually all suspects advised of their rights would assert them.

At one point Professor Taylor told the Court that if his opponents' arguments were to prevail, the result would be either "the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions."<sup>45</sup>

At another point in his amicus brief, Taylor ridiculed the idea that the privilege against self-incrimination should apply to police interrogation, assuming once again that very few, if any, suspects would waive their rights:

Assuming that the privilege against self-incrimination is the principal legal element in the interrogation problem, virtually the only function of station-house counsel will be to paste adhesive tape over his new clients' mouths. It is at best dubious whether such a practice would attract the cream of the bar.<sup>46</sup>

A number of state and federal judges also believed the Supreme Court was moving too quickly in the confession area.<sup>47</sup> Probably the most respected member

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<sup>44</sup> However, during the oral argument, the waiver of rights issue never arose.

<sup>45</sup> Brief on behalf of New York, et al., as Amici Curiae at 5, *Miranda v. Arizona*, 384 U.S. 436 (1966) (Summary of Argument).

In England, when a suspect brought to the police station asks for a lawyer, he actually gets one promptly. This is not the case in the United States. In this country, when a suspect brought to the police station asks for a lawyer, the police need not produce one. All they are required to do when a suspect asks for a lawyer is to cease questioning immediately—unless the suspect himself initiates further communication with the police (in which event the police may resume questioning the suspect). See generally, Craig Bradley, *Should American Courts Heed the 'English Warnings'?*, 43 TRIAL 62, 62 (2007).

<sup>46</sup> Amicus brief on behalf of New York, et al., , *supra* note 45, at 30.

<sup>47</sup> See, e.g., WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 36, 38, 55, 78 (1967) (written before *Miranda*); Charles D. Breitell, *Criminal Law and Equal Justice* 1966, UTAH L. REV. 1 (1966) (written before *Miranda*); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

of this group was Judge Henry Friendly. At one point he objected to “conditioning [police] questioning on the presence of counsel” because doing so “is . . . really saying that there may be no effective, immediate questioning by the police.”<sup>48</sup> Such a requirement, warned Friendly, “is a rule that society will not long endure.”<sup>49</sup>

As it turned out, of course, *Miranda* did not “condition” police questioning on the presence of counsel. Instead, it provided the police with a huge opening—it permitted them to get custodial suspects to talk to them about their cases without remaining silent or first meeting with a lawyer.<sup>50</sup>

#### IV. HAS THE DISTANCE BETWEEN THE “GATEHOUSE” AND THE “MANSION” DISAPPEARED?

As Professor Pizzi spells out, in the federal system many defendants are under tremendous pressure to waive their constitutional rights and plead guilty—or face sentences that are brutal in their length and much greater than the appropriate punishment for the crime charged. Among the tools (or perhaps one should say, weapons) available to prosecutors are “prior felony informations,” filed for sentencing purposes by prosecutors, which double the mandatory sentences for the crime—or may even lead to a life sentence if the prosecutor discloses that the defendant has a prior felony conviction.<sup>51</sup>

This helps explain why only three percent of federal defendants feel they can afford to go to trial. It also helps explain why the incarceration rate in this country is many times higher than the rates in other western countries.<sup>52</sup>

As a federal district judge recently observed:

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Justice Schaefer proposed interrogation by or before a judicial officer, but he also considered police interrogation “a useful and desirable technique of law enforcement.” SCHAEFER, *supra* at 12. Speaking at a police interrogation conference held shortly before *Miranda* was decided; Justice Schaefer stated that he thought he “share[d] [the] view” that “it is not possible to enforce criminal law unless station house interrogation in the absence of counsel is permitted.” 54 KY. L.J. 499, 521, 523 (1966) (panelists’ comments).

<sup>48</sup> Remarks of Judge Henry J. Friendly, 43 A.L.I. PROC. 250 (1966) (made a month before *Miranda* was decided).

<sup>49</sup> *Id.*

<sup>50</sup> Louis Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 744–45 (1992), goes so far as to say:

*Miranda* . . . is best characterized as a retreat from the promise of liberal individualism brilliantly camouflaged under the cover of bold advance. . . . What *Miranda* added to *Escobedo* [and other cases] was a mechanism by which the defendant could give up [certain] rights. The warning-and-waiver ritual that is at *Miranda*’s core served to insulate the resulting confessions from claims that they were coerced or involuntary.

<sup>51</sup> See Pizzi, *supra* note 1 at 638–39. See generally Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U.P.A. L. REV. 79 (2005).

As Professor Pizzi points out, “prior felony informations,” which pressure defendants to plead guilty, “resemble the use of ‘three-strikes’ laws passed in many states” in the 1990s. See Pizzi, *supra* note 1, at 11.

<sup>52</sup> See Pizzi, *supra* note 1, at 638.

[I]n a world where 97% of sentenced defendants plead guilty pursuant to agreements that require such pleas to occur before the prosecutor prepares the case for trial, the sharpened focus on the offense and the defendant that results from such trial preparation rarely occurs. The thin presentation needed for indictment is hardly ever subjected to closer scrutiny by prosecutors, defense counsel, judges or juries. The entire system loses an edge, and I have no doubt that the quality of justice in our courthouses has suffered as a result.<sup>53</sup>

Professor Pizzi makes a powerful case. Along the way, he makes good use of a recent opinion by Judge John Gleeson.<sup>54</sup> (Pizzi informs us that before becoming a federal judge, Gleeson was responsible for convicting John Gotti, the head of the Gambino family).<sup>55</sup>

Judge Gleeson has written a grim—but illuminating—opinion that runs more than forty pages in the federal supplement and contains 181 footnotes (some of them quite long). His long, impressive opinion reads like a first-class law review article. It describes how the threat of a prior felony information was used in the very case he decided—and in many others as well—to coerce a guilty plea from the defendant. I cannot resist quoting at length from Judge Gleeson’s opinion:

[Instead of reserving life sentences or long sentences for] the hardened, professional drug traffickers who should face recidivism enhancements upon conviction[,] . . . federal prosecutors exercise their discretion by reference to a factor that passes in the night with culpability: whether the defendant pleads guilty. To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.

Prior felony informations don’t just tinker with sentencing outcomes; by doubling mandatory minimums and sometimes mandating life in prison, they produce the sentencing equivalent of a two-by-four to the forehead. The government’s use of them coerces guilty pleas and produces sentences so excessively severe they take your breath away. Prior felony informations have played a key role in helping to place the

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<sup>53</sup> United States v. Kupa, 976 F. Supp. 2d 417, 453 (E.D.N.Y. 2013) (Gleeson, J.).

<sup>54</sup> See *id.*

<sup>55</sup> See Pizzi, *supra* note 1, at 640 n.45, referring to *United States v. Kupa*, 976 F. Supp. 2d 417 (E.D.N.Y. 2013).

federal criminal trial on the endangered species list.<sup>56</sup>

Professor Pizzi (and Judge Gleeson as well) have convinced me that the proceedings in the “mansion” may need even more fixing than some of the proceedings in the “gatehouse.”<sup>57</sup> After all, in recent years some of the oppressive activities of federal prosecutors make some police interrogation tactics look like “child’s play.”

At least in the federal courts, criminal trials seem to be on the verge of extinction. We cannot continue to move in this direction. We must execute a turnaround. To quote Professor Pizzi, “we need to ask some very hard questions about charging, about plea bargaining, and about our trial system and the avoidance of that system.”<sup>58</sup>

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<sup>56</sup> 976 F. Supp. 2d at 419–20 (footnote omitted).

Quite recently, Judge Gleeson was in the news for his involvement in the Francois Holloway case. In 1996, Mr. Holloway was sentenced to fifty-seven years for armed carjackings—a prison term that at the time was more than twice the average sentence in the district for murder. The prosecution had offered Holloway a plea deal of about eleven years, but he turned it down after his lawyer assured him he could win at trial. (But he did not.) None of Holloway’s co-defendants, who all pleaded guilty, received more than six years.

Judge Gleeson persuaded the United States attorney for the Eastern District of New York to vacate two of Holloway’s convictions. The judge is expected to resentence Holloway to time served. See Stephanie Clifford, *Citing Fairness, U.S. Judge Acts To Undo A Sentence He Was Forced To Impose*, N.Y. Times, July 29, 2014, at A16.

<sup>57</sup> Recently, former Vice President Walter Mondale criticized prosecutors for “excessive use . . . of surprisingly high minimum sentences, and ‘stacking up’ proposed charges in order to pressure the defendant to accept a guilty plea.” He also notes that, “[a]s a practical matter, there is a very severe penalty for those who insist on their right to a criminal trial. This so-called ‘trial penalty’ may help explain the high percentage of defendants who plead guilty rather than go to trial.” See Gideon v. Wainwright and Related Matters: *An Armchair Discussion Between Professor Yale Kamisar and Vice President Walter Mondale*, 32 LAW AND INEQ. 207, 213 (2014).

<sup>58</sup> Pizzi, *supra* note 1, at 643.